Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

DARLIE LYNN ROUTIER,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

The original court reporter's record was stricken after a finding that it did not conform to what occurred at trial. In its opinion affirming Petitioner's conviction and sentence of death, the Texas Court of Criminal Appeals acknowledged that "[t]o say that there were problems in obtaining the reporter's record in this case is a gross understatement." App. A, p. 28a. *Routier v. State*, 112 S.W.2d 554, 569 (Tex. Crim. App. 2003).

The question presented is:

> Whether, under the circumstances of this case, Petitioner was afforded her right to procedural due process in accordance with *Chessman v. Teets*, 354 U.S. 156 (1957) when, through counsel, she was not allowed to cross-examine the witnesses, present witnesses on her behalf nor provided adequate notice of the issues to be decided at the hearings on the new reporter's record.

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Petitioner, Darlie Lynn Routier, respectfully requests that a writ of certiorari be issued to review the judgment of the Court of Criminal Appeals of The State of Texas.

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals is reported at *Routier v. State*, 112 S.W.3d 554 (Tex. Crim. App. 2003). App. A. Petitioner's motion for rehearing was denied without a written opinion. App. B.

STATEMENT OF JURISDICTION

The decision of the Court of Criminal Appeals was issued on May 21, 2003. The motion for rehearing was denied on September 10, 2003.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States provides in pertinent part:

> . . . nor shall any State deprive any person of life . . . without due process of law . . .

STATEMENT OF THE CASE

Upon review of the original appellate record, Petitioner filed a motion in the Court of Criminal Appeals citing a number of missing exhibits and inconsistent,

inaccurate and/or contradictory transcriptions of the trial proceedings. The lower court granted Petitioner's motion and, among other things, ordered that the trial court "ensure that the reporter's record is made to conform to what occurred at trial." App. C.

Following the initial hearing regarding the accuracy of the reporter's record held on October 14, 1998, the trial court ordered the court reporter, Sandra Halsey, to review the entire record to determine whether it was accurate and to correct any mistakes. SRR.1: 15-17.[1] After another hearing on November 4, 1998, the court appointed three certified court reporters to compare random samplings of Sandra Halsey's stenographer's notes with the corresponding computer generated translation edit disks to determine whether the original record could be certified.

At the first hearing, Halsey testified that there were no audiotapes from the guilt/innocence phase of the trial due to a malfunctioning microphone in her recording equipment. She subsequently told the same thing to three court reporters appointed to sample her work. SRR.3: 12, 19, 25. Halsey later recanted this story and advised a prosecutor she did have audiotapes. SRR.3: 37-8.[2]

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1. There were ultimately multiple hearings resulting from efforts to correct the reporter's record. References to these supplemental reporter's records will be cited in the format "SRR (Vol): (page)".

2. Halsey would eventually testify at a hearing to revoke her reporter's license that she told this lie out of a concern that her error-filled record would cause a reversal of Petitioner's conviction. SCR.2: 526. (The pleadings, orders and other documentary filings in the record dispute were compiled in a supplemental clerk's record and will be cited as "SCR(Vol): (page)".)

At a hearing on November 13, 1998, the three expert court reporters recommended that the entire "Halsey record" be reviewed by another court reporter. SRR.3: 14, 16, 22. The trial court relieved Halsey of her duties as the official court reporter and appointed her an attorney. SRR.3: 57-59. When this hearing was reconvened another day, Halsey invoked the Fifth Amendment and refused to answer any questions as to her work in Petitioner's case. SRR.5: 8-11.

Ultimately, a new court reporter, Susan Simmons, was appointed by the court to review all the materials that Halsey had produced to the court and for her to determine whether a certified record could be generated. These materials included steno notes, edit disks and audiotapes. SRR.5: 16; SCR.1: 21.

On April 1, 1999, the trial court conducted a hearing under the following rules:

1. Only the court could call witnesses;

2. The parties could not personally question the witnesses;

3. Any questions desired by the parties would have to be submitted in writing to the court prior to the witness testimony but with an opportunity provided to submit in writing follow up questions after the witness' original testimony; and

4. No objections by the parties were permitted during any witness testimony.

SRR.13: 4-7; 39-40.

Prior to this hearing, Petitioner filed a motion objecting to the above restrictions, alleging "[t]his unprecedented procedure would violate the defendant's sixth amendment right to counsel, the confrontation clause and the due process clause" and citing and explaining the holdings of *Chessman v. Teets*, 354 U.S. 156 (1957) and several Texas cases and rules of evidence. App. D. The court denied this motion. SRR.13: 5.

The court proceeded to call as its witness Susan Simmons, the new court reporter appointed to review the original "Halsey record". Simmons testified that she performed an "audio edit" of the Halsey record. SRR.13: 28. Her procedure was essentially to play the audiotapes while reading the Halsey record and to mark in red ink any errors discerned from what she heard on the tapes. SRR.13: 28. Simmons next generated a new record that reflected these changes. SRR.13: 28-29.

The "Simmons record" so prepared comprised 28 volumes which were not available to Petitioner's counsel until after this April 1, 1999, hearing. Petitioner had also filed a written objection to the court's filing the Simmons record until Petitioner had an opportunity to review the same. SCR.1: 139. The trial court deferred ruling on this motion, SRR.13: 4, but thereafter issued a written order giving Petitioner 120 days to file any objections or further motions for relief. SCR.1: 128.

This order also made a finding that the Halsey record did not conform to what occurred at trial and that it should be replaced with the Simmons record. SCR.1: 127.

On April 26, 1999, the Court of Criminal Appeals granted Petitioner's motion to have the trial court review the balance of the appellate record (jury voir dire and pre-trial hearings) that Halsey had prepared. App. E. On October 14, 1999, the trial court conducted another hearing by calling and questioning Simmons, following which the court issued a new order finding that these additional volumes of the Halsey record were inaccurate and should be replaced by 26 new volumes prepared by Simmons. Further, the court also gave the parties an additional 120 days to review the entire Simmons record and file written objections and a specific request for an additional hearing. SCR.1: 103.

It was next determined that two more volumes had been prepared by Halsey but not reviewed by Simmons. On January 28, 2000, at a hearing conducted under the same limitations on counsel as before, Simmons revealed that she would not certify the accuracy of 53 pages of the Halsey record as there were no audiotapes ensuring the accuracy of Halsey's steno notes:

> [Susan Simmons]: Based on the 10,000 pages that I've done previous to this, and seeing Miss Halsey's record compared to her notes and the audiotape, I don't feel comfortable certifying to the first 53 pages without an audiotape.

SRR.26: 13.

In accordance with the trial court's revised deadline for filing objections and a request for a hearing, SCR.2: 569, on March 2, 2000, Petitioner filed written objections to the Simmons record, App. F, SCR.2: 490, and a separate motion requesting a hearing to resolve the contested factual disputes. App. G, SCR.2: 480.

Petitioner's motion for an evidentiary hearing identified twenty-seven specific disputed factual questions within the new record.

Nine objections to the new record were presented by Petitioner in a detailed twenty-eight page pleading. There was a point heading, a statement of facts and arguments and authorities for each objection. Petitioner's objections challenged virtually all of the substantive changes that Simmons had made in the record, the loss or destruction of specific parts of the record, and the procedures that Simmons used to create her record.

The trial court set Petitioner's case on the calendar for September 8, 2000, to conduct a hearing on her objections to the new reporter's record. SCR.2: 391, 465. Petitioner served subpoenas for Halsey, Simmons and nine other witnesses to testify at the hearing. SCR.2: 560-1, 370, 372, 374, 381, 383, 385, 387, 389. In addition, the trial court signed Petitioner's subpoena for an out of state witness who was to be flown from Virginia to Dallas. SCR.2: 464-67. Petitioner also filed a motion to suppress the unauthenticated audiotapes. SCR.2: 408, 468. The State acknowledged in its response to that motion that it expected the trial court to conduct the hearing and allow the parties to question Simmons about the new record. SCR.2: 391. The trial court cancelled the hearing on the day before it was scheduled to take place with the issuance of its September 7, 2000, order. App. H.

On September 7, 2000, at 3:15 p.m., the trial court issued a one and a half page order that made the following findings:

1. The trial court found that it complied with all of the orders that the Court of Criminal Appeals

issued before Appellant filed her objections to the new reporter's record;

2. All of the prior findings and orders previously issued by the trial court before Appellant filed her objections to the new record were incorporated without making any findings of fact or conclusions of law about those objections;

3. Appellant's written objections to the new reporter's record and motion for a hearing adequately preserved all of her claims because any tribunal would be able to discern the basis for them;

4. An additional evidentiary hearing is not necessary to comply with the orders of the Court of Criminal Appeals that were issued before Appellant filed her objections to the new record; and

5. No additional evidentiary hearings shall be conducted by the trial court unless the Court of Criminal Appeals instructs other-wise.

App. H, SCR.2: 368.[3]

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3. Ironically, despite all its other efforts to produce an accurate reporter's record, the trial court has yet to address one of the specific issues raised in Petitioner's Motion To Correct/Clarify Reporter's Record filed on October 13, 1998, which the Court of Criminal Appeals granted and directed the court to resolve in its order of October 14, 1998. App. C. Specifically, Petitioner complained of the absence of any reference in the record to the Petitioner's presence or

(Cont'd)

On September 25, 2000, Petitioner filed her Defendant's Formal Bill of Exception No. 1 together with a proposed order. SCR.2: 282, 285. Contemporaneously with this pleading, Petitioner filed a Motion For A Hearing To Make an Offer Of Proof Of The Evidence That She would Have Introduced At The Hearing On Her Objections To The "Simmons Record". SCR.2: 286.

The trial court, in response to these pleadings, issued an order on October 3, 2000, finding that "it lacks jurisdiction to consider any additional filings in this case unless the case is again remanded to this court by the Court of Criminal Appeals." SCR.2: 281.

On January 23, 2001, Petitioner filed objections to the Simmons record with the Texas Court of Criminal Appeals requesting an order requiring the trial court to conduct an evidentiary hearing that comported with due process. App. I. This pleading specified Petitioner's procedural due process objection under *Chessman v. Teets*, *supra*. App. I, pp. 178a-79a. On May 24, 2001, this motion was denied.

(Cont'd)

absence during the trial court's consideration and ruling on two of three jury notes. SCR.1: 39-41. No action on this issue was taken by the trial court before (or even after) filing the new reporter's record. Questions never asked of either the original or the new court reporter were whether the stenographic notes reflect the Petitioner's presence and, if not, the bases for the parentheticals or lack thereof in both versions of the reporter's record as to Petitioner's presence or absence at these times. The new reporter contradictorily adopted most (but not all) of the original reporter's parentheticals while personally expressing the opinion, which was adopted by the trial court, that the original reporter's record could not be relied upon.

REASONS FOR GRANTING THE PETITION

In its first substantive evaluation of *Chessman v. Teets, supra*, the Texas Court of Criminal Appeals concluded that procedural due process does not require that a criminal defendant be permitted to confront witnesses, present witnesses on her own behalf or be given notice of the issues to be resolved at a hearing to settle a "seriously disputed record". *Chessman v. Teets, supra*, 354 U.S. at 164.[4] In addition to being fundamentally wrong, given the myriad of hearings required by trial courts on fundamental issues such as those involving the Fourth, Fifth, Sixth, and Fourteen Amendments, the lower court's opinion in Petitioner's case exposes a significant portion of the population to the denigration of their constitutional right to due process in the State of Texas, and potentially elsewhere.[5]

A. *Chessman*

After the original court reporter died prior to the completion of the appellate record, a substitute reporter prepared a transcript. The transcript was provided to the *pro se* defendant who filed a list of some 200 requested

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4. Prior to Petitioner's case, the only published opinion at the Court of Criminal Appeals citing *Chessman* was in a dissent on a sub-issue in *Chessman. Ex parte Breen*, 420 S.W.2d 932, 937 (Tex. Crim. App. 1967) (Onion, J. dissenting).

5. Texas has the second largest population in the nation and the largest prison population. The Texas Court of Criminal Appeals oversees the imposition of the ultimate punishment of death at a rate of nearly four times that of the second highest state. "Facts About the Death Penalty", December 5, 2003, Death Penalty Information Center, www.deathpenaltyinfo.org.

corrections and also requested a hearing to enable a challenge to the new court reporter's ability to prepare a transcript from the deceased reporter's notes and to prove the inaccuracies and omissions in the transcription. The trial court conducted three hearings to settle the record but did so without the defendant being present. Nonetheless, the trial court allowed 80 of the defendant's requested corrections.

This Court held that the defendant had a right to be present at the proceedings either in person or by appointed counsel. This Court concluded that the accused "has never had his day in court upon the controversial issues of fact and law involved in the settlement of the record upon which his conviction was affirmed." 354 U.S. at 164.

In remanding the case for "proceedings satisfying the requirements of due process", this Court rejected the holding of the California Supreme Court decision that held that the inaccuracies claimed by the defendant would not have changed the result of his appeals. 354 U.S. at 164 n.12. This Court stated that "an adversary hearing focused squarely on the adequacy of the transcript" might have developed facts which would lead to a different decision. 354 U.S. at 164 n.12.

B. Opinion of the Court of Criminal Appeals

The Court of Criminal Appeals rejected Petitioner's procedural due process claim on the bases that Petitioner and her counsel (1) "had notice of the proceedings"; (2) "were present during the extensive proceedings"; and (3) "were given ample opportunity to make objections to the Simmons record." App. A, p. 35a.

C. Conflicts Between *Chessman* And The Lower Court's Opinion

The basic tenets of procedural due process are notice of the issues to be resolved and an opportunity for the defendant to be heard, to examine the witnesses, to offer testimony, and to be represented by counsel.[6]

1. *Cross-Examination*

It not being disputed that Petitioner was entitled to due process in settling the disputed record, there remains the determination of what specific rights were required.[7] "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).[8]

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6. The lower court rejected Petitioner's citation to *Lankford v. Idaho*, 500 U.S. 110 (1991) as being distinguishable from Petitioner's case on the facts. Although it missed the point of Petitioner's citation to *Lankford*, nothing in the lower court's opinion appears to reject these principles except in their application to Petitioner.

7. "Once it is determined that due process applies, the question remains what process is due." *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972).

8. It is unprecedented under Texas law for the parties to an adversary proceeding to be restrained from directly examining the witness. In fact, although permitted in many other jurisdictions, in Texas a trial court's asking questions of witnesses has been strongly cautioned and limited to clarifying questions. *See generally*, *Morrison v. State*, 845 S.W.2d 882, 887 (Tex.Crim.App. 1993). While FED. R. EVID. 614(a) permits a court to call its own witnesses, this rule mandates that the parties may then "cross-examine witnesses thus called."

Cross-examination is "'the greatest legal engine ever invented for the discovery of truth.'" *California v. Green*, 399 U.S. 149, 158 (1970), quoting 5 J. Wigmore, Evidence § 1367 (3d ed. 1940). The trial court gave no reason for prohibiting Petitioner from cross-examining Susan Simmons other than "this is a fact-finding hearing and I'm doing this at the direction of the Court of Criminal Appeals . . ." SRR.13: 4. The opinion of the Court of Criminal Appeals does not explain its conclusion that submitting written questions to be asked by the trial judge was a sufficient substitute for cross-examination.[9]

It is Petitioner's contention that submitting written questions for the trial court to ask is not sufficient fuel to stoke the firebox of Wigmore's greatest legal engine for reaching the truth. Simmons' certification as a court reporter for a U.S. district court does not immunize her from the possibilities of bias, motive, lack of expertise, faulty mechanics, or other deficiencies that witnesses in the general population or even other experts may be susceptible to. *See generally, Goldberg v. Kelly*, 397 U.S. at 270, *see also Brooks v. Tennessee*, 406 U.S. 605, 609 (1972) (witness may collapse under skillful and persistent cross-examination even though honest and reliable).

2. *Notice*

The record of the hearings held to settle the disputes on the trial transcript demonstrate that Petitioner did not have notice that the several appearances of Susan Simmons

9. Even a cursory review of the trial court's questioning of Simmons reveals a pattern of high lob leading questions seemingly designed to validate a *fait accompli* — the already prepared new record was an accurate transcription of the trial.

were the only opportunities Petitioner would have to present evidence challenging the reconstructed record. Fundamentally, it would have been impossible for Petitioner to divine at the time of these hearings what objections and factual disputes she could identify given that Petitioner had no opportunity to review the massive new record beforehand.

In her first appearance in court after she began her efforts to save the trial record, Simmons appeared with 28 new volumes and the corresponding volumes of the Halsey record that had been red-lined with corrections. Petitioner had previously filed a written objection to the filing of the Simmons record prior to Petitioner having an opportunity to review it. SCR.1: 139. In taking up this motion, the trial court said it was not going to issue a ruling "as of today's date" and that Petitioner's motion would be taken up later. SRR.13: 4. At the conclusion of this April 1, 1999, hearing, Petitioner's counsel advised the court that Petitioner may want to present some witnesses after reviewing the Simmons record to which the court said "That's fine. We'll cross that bridge when we get to it." SRR.13: 58.

By written order dated April 14, 1999, the trial court made a recommendation to the Court of Criminal Appeals that the Halsey record be replaced by the Simmons record. It also ordered the "Simmons record" to be "delivered" to (not *filed* with) the Court of Criminal Appeals and ordered that the parties were to have 120 days to review the new record and submit any objections or motions thereto. SCR.1: 128-9.

Following the subsequent hearings wherein Simmons produced more new volumes of the record, a similar order was issued by the trial court providing time for the parties to

review the new materials and thereafter file objections or motions. At no time prior to the order of September 7, 2000, did the trial court issue any order or otherwise notify Petitioner that any scheduled hearing was the time at which Petitioner should produce her witnesses because the court would be closing the evidence or otherwise issuing a final ruling. Indeed, by affording Petitioner a reasonable time to review the Simmons record and to file objections and motions and by then scheduling the September 8, 2000 hearing, Petitioner was given an appropriate notice of just the opposite: that she would have her day in court at that time and she should produce her evidence then.

3. *Right to Present Witnesses*

Following the detailed objections and specific designation of fact issues filed by Petitioner in March, 2000, a hearing ultimately was scheduled for September 8, 2000. Petitioner subpoenaed eleven witnesses for the hearing, including both prosecution and defense attorneys involved in Petitioner's trial; media who had spoken to Halsey; Halsey; and one of the expert court reporters who initially reviewed excerpts of Halsey's record at the trial court's request. An out-of-state subpoena had also been authorized by the trial court for one of the State's witnesses on the ground that Simmons had contacted him to clarify what *another* witness had testified to at trial. SCR.2: 417.

A significant issue to be developed via the trial participants was whether a hearing had been conducted on a conflict of interest claim that had come up during trial. In both the Simmons and Halsey record, the presiding judge, prosecutor, defense counsel, Petitioner and Sandra Halsey all stated that there had been a previous on-the-record conflict

hearing. However, there appeared no such previous hearing in either record.[10] The establishment that such a hearing occurred but was not in the appellate record could have resulted in a finding that a material part of the record was lost or destroyed thus requiring a reversal of Petitioner's conviction. Another possibility, in such an event, would have been an order requiring Simmons, for the first time, to make a systematic review of the official record of the trial (the stenographic notes). If such a hearing was found and transcribed, the existence of an actual conflict and/or the admonitions to, or waivers (if any) by Petitioner would then need to be examined under *Wood v. Georgia*, 450 U.S. 261 (1981); *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1972); and *United States v. Swartz*, 975 F.2d 1042 (4th Cir 1992).[11]

In canceling the scheduled hearing, the trial court precluded Petitioner from any showing of the evidentiary bases for her objections or support for the accurate resolution of disputed facts. The appropriate issue before the court was whether there were any facts that *may* bear on the accuracy of the Simmons record. Petitioner's objections and designation of fact issues established that Petitioner should have been afforded her right to present evidence relevant to the accuracy of her appellate record.

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10. Under Texas law, the unchallenged statement of a trial participant that something had occurred during the trial is considered proof of such. *See Rey v. State*, 897 S.W.2d 333, 336 (Tex. Crim. App. 1995); *Moody v. State*, 827 S.W.2d 875, 879 (Tex. Crim. App. 1993); *Hicks v. State*, 525 S.W.2d 177, 178 (Tex. Crim. App. 1975); and *Quevedo v. State*, 661 S.W.2d 321 (Tex. App. – Corpus Christi 1983, pet.ref'd.).

11. *Mickens v. Taylor*, 535 U.S. 162 (2003) may also have come into play as that case was decided while Petitioner's case was still pending in the lower court.

CONCLUSION

The answer to the question presented would be easily informed if the question were revised to ask whether the procedure afforded Petitioner would have satisfied this Court's demands of procedural due process if such had been adopted on the remand in *Chessman*.

For the reasons stated, the petition should be granted.

Respectfully submitted,

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